87-1974

NO.

Supreme Court, U.S.
FILED
JUN 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

TEDDY ROUSSELLE,
Petitioner

VS

STATE OF LOUISIANA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF LOUISIANA

ROBERT E. LEE, SR.
Attorney for Petitioner
3942 Peach Tree Crt.
New Orleans, Louisiana 70131
(504) 391-0472

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

May a state refuse to Apply the same principle of law equally as between a convicted female defendant whose conviction was reversed and a convicted male defendant whose conviction was upheld, when both were charged with the same offense, and the identical criminal element necessary for a conviction under the statutory law and jurisprudence of said state was applied to reverse the female defendant's conviction but denied as to the male defendant without opinion or reasons stated, in the face of *Griffen v People of State of Illinois*, 76 S. Ct. 585, 351 U.S. 12, 100 L.Ed. 891, rehearing denied 76 S. Ct. 844, 351 U.S. 958, 100 L.Ed. 1480?

TABLE OF CONTENTS

Page

Question Presented.....i
Table of Contents.....ii
Index of Authorities.....iii
Opinion Below.....1
Statement of Jurisdiction.....1
Constitutional Provisions Involved.....2
Statement of the Case.....2
Reasons for Granting the Writ.....4
Argument.....5
Conclusion.....5
Certificate of Service.....7

APPENDIX A, Reconsideration Denied by La. Supp. Ct., April 7, 1988.....A-1
APPENDIX B, Writ of Certiorari Denied by La. Supp. Ct., March 11, 1988.....A-2
APPENDIX C, Decision of the Fourth Circuit Court of Appeal (one dissent).....A-3
APPENDIX D, Trial Excerpts of Transcript referred to in Court of Appeal decision of defendant's age.....A-11
APPENDIX E, Entire Case, State of Louisiana v. Berkley, 482 Snd 140 (1986).....A-17
APPENDIX F, Application for Re-Hearing to La. Supp. Ct. (Constitutional Question Raised) Last paragraph of Application.....A-20

INDEX OF AUTHORITIES

CASES Page

Griffin v. People of State of Illinois, 76 S.Ct. 585, 351 U.S. 12 100 L.Ed. 891.....2,5

State v Berkley, 482 Snd 140 (1986).....4

Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627.....5

State v Rousselle, 520 Snd 739 (1987).....A-1,A-2,A-3

OTHER AUTHORITIES

28 U.S.C. § 1257(3).....2

Fourteenth Amendment to the United States Constitution.....2,5

In the
Supreme Court of the United States
OCTOBER TERM, 1987

TEDDY ROUSSELLE,
Petitioner

VS

STATE OF LOUISIANA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF LOUISIANA

The petition of Teddy Rousselle, respectfully prays that a Writ of Certiorari issue to review the judgment and the opinion of the Louisiana Supreme Court entered in these proceedings on April 11, 1988, denying reconsideration of its denial of a Writ of Certiorari entered on March 7, 1988.

OPINION BELOW

The opinion of the Louisiana Fourth Circuit Court of Appeals, 520 Snd 739, (1987, bearing Docket No. 87-K-2419, of the Louisiana Supreme Court, is appended hereto as Appendix "A", page 11, Appendix "B", page 12, and Appendix "C", page 13 hereof.

JURISDICTION

The judgment of the Louisiana Supreme Court, final, was entered on April 11, 1988. (Appendix "A", page 11).

This Petition for Certiorari to the Supreme Court, State of Louisiana is filed herein within sixty days of the final denial of reconsideration described below. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3) and *Griffen v. People of State of Illinois*, 76 S.Ct. 585, 351 U.S. 12, 100 L.Ed. 891.

CONSTITUTIONAL PROVISIONS INVOLVED

The *Fourteenth Amendment to the United States Constitution*, provides, in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction of equal protection of the laws."

STATEMENT OF THE CASE

Defendant, Rousselle, and Loretta Matthews were living together as common law husband and wife with the infant daughter of Loretta from another man-not from Rousselle, in defendant's mother's house, Joan McDonald.

On the evening of September 10, 1985, Loretta was lifting the infant child, Elizabeth, age 13 months, from a rear car seat when she felt a soft spot on the baby's head and calling this to the attention of defendant whereupon they proceeded to his mother for her opinion. Mrs. McDonald advised the couple to take the child to Charity Hospital, in New Orleans, immediately which they did.

While at the hospital several doctors examined the child, one of them Dr. Assad, a female pediatrician from

Egypt. The examination was conducted after the defendant had left Loretta and the child since he had to arise early the next morning for work as a dispatcher for the local fire department.

Loretta was asked by Dr. Assad how did the child receive its injury to the head and two old fractures to the child's wrist. Loretta advised this doctor that she did not know but that one day while she was bathing Elizabeth she got out of the tub and while running away banged her head on the floor as she slipped. And that Elizabeth was a very active child. It had also been determined by Dr. Assad that the child was suffering from seizures due to the pressure on her brain and probably caused by a subdural hematoma which caused the soft spot on her head.

Several hours later Loretta was interviewed by the Plaquemines Parish Sheriff's Office, which had jurisdiction, who advised her to tell them what really happened or she would be charged with Cruelty to a Juvinelle whereupon Loretta changed her story and implicated defendant as the perpetrator of the child's injuries.

Defendant was never interrogated but was arrested and charged with Cruelty to Juveniles, R.S. LSA 14:93, had a judge trial, found guilty and sentenced to 15 years at hard labor in Angola. Part of this sentence resulted due to a multi-billing by the State.

Defendant objected vigorously to the multi-billing on the grounds that defendant had received an illegal sentence some years before and also that the 5 year period between offenses had expired cutting off the State's time to multi-bill.

Further, and more seriously, the State never offered any evidence as to the defendant's age, a vital element in

the crime of Cruelty to Juveniles.

"Petitioner pointed out the unconstitutionally of refusing to address the question of defendant's age in his Application for Rehearing filed in the Louisiana Supreme Court." Last paragraph. (Appendix "F") Citing violations of the Equal Protection Clause of the Fourteenth Amendment and violation of the 5th Amendment.

REASONS FOR GRANTING THE WRIT

This petition sets out with stark reality that for reasons of its own, the State of Louisiana, chose not to address the age of the defendant in the face of a case described by the same Court of Appeals some 10 months earlier reversing a conviction of a female convicted with Cruelty to Juveniles wherein this Court used non-proof of the defendant's age by the State as grounds for reversal in a short concise opinion. *State v. Berkley,* 482 Snd 140 (1986) (Appendix "E", page 15) In the only reference to defendant's argument in his brief to the Fourth Circuit, the opinion held that references to defendant's employment as an ambulance driver was sufficient to supply the missing element, age of 17 or over.* These references were elicited by defense counsel-not the State. Defendant never took the stand. When defendant took writs to the Louisiana Supreme Court on this point the conviction was allowed to stand without comment except for one dissent. (Appendix "A", page 11)

No other rational explanation for the above described "double standard" exists except for that of sex discrimination.

* See Appendix "D", page 14 for excerpts from trial transcript.

THIS HONORABLE COURT SHOULD AND OUGHT TO GRANT THE WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT, APPLIED FOR HEREIN, OTHERWISE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WILL BE REDUCED IN DIGNITY, FORCE AND RESPECT.

ARGUMENT

In this case the Louisiana Fourth Circuit Court of Appeals apparently lined up on the side of the prosecutor to convict and affirm the lower court's decision, given the silence by the State when it had every opportunity to elicit the age of defendant. "Under the Fourteenth Amendment, differentiations by a state with respect to criminal appeals that have no relation to a rational policy of criminal appeal are not sanctioned." *Griffen,* supra. and, "To allow on appeal, but with some difference among convicted persons as to terms upon which appeal is exercised, does not deny due process but may present a question of equal protection." *Griffen,* supra.

Finally, petitioner's case, conviction and appellant review deserve a review by this Court, for, "Only by sifting the facts and weighing the circumstances on a case-by-case basis can a nonobvious involvement of a state be attributed its true significance in determining whether the state in any of its manifestations has become significantly involved in private discrimination." *Reitman v. Mulkey,* 387 U.S. 369, 87 S.Ct. 1627.

CONCLUSION

For the reasons set forth hereinabove this Honorable Court should and ought to issue its Writ of Certiorari

to review the judgments of the Louisiana Supreme Court.

Respectfully submitted,

ROBERT E. LEE, SR.
Attorney for Petitioner
3942 Peach Tree Crt.
New Orleans, Louisiana 70131
(504) 391-0472

CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of May, 1988, copies of this Petition for Writ of Certiorari to the United States Supreme Court were mailed, postage prepaid, properly addressed, and deposited in the United States Mails to:

William J. Guste, Jr.
Attorney General
State of Louisiana
State Capitol
P. O. Box 44005
Baton Rouge, La. 70804

Darryl W. Brubrig, Sr.
District Attorney
Parish of Plaquemines
Point-ala-Hache, La.
70092

IT IS FURTHER CERTIFIED AND SWORN TO THAT ALL OF THE APPENDICIES ATTACHED HERETO TO THIS PETITION FOR WRIT OF CERTIORARI AND FILED HEREIN ARE TRUE COPIES OF WHAT THEY PURPORT TO BE.

SWORN TO AND SUBSCRIBED BEFORE
ME THIS _____ day of _____, 1988.

_____
NOTARY PUBLIC

ROBERT E. LEE, SR.
Attorney for Petitioner
3942 Peach Tree Crt.
New Orleans, Louisiana 70131
(504) 391-0472

APPENDIX A

STATE OF LOUISIANA V TEDDY ROUSSELLE,
520 sd 739(1987)

JUDGMENT OF LOUISIANA SUPREME COURT (RECONSIDERATION DENIED)

ENTERED ON APRIL 7, 1988

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS

TEDDY ROUSSELLE No. 87-K-2419

- - - -

IN RE: Rousselle, Teddy, Applying for Reconsideration of this Court's order of March 11, 1988; to the Court of Appeal, Fourth Circuit, Number KA-3791: Parish of Plaquemines 25th Judicial District Court Div. B, Number 80630

- - - -

April 7, 1988

Reconsideration denied.

HTL	JAD	PFC
WFM	JLD	JCW
	LFC	

Supreme Court of Louisiana
April 7, 1988

/S/ illegible

Clerk of Court
For the Court

APPENDIX B

STATE OF LOUISIANA V TEDDY ROUSSELLE,
520 sd 739(1987)

JUDGMENT OF LOUISIANA SUPREME COURT DENYING WRIT OF CERTIORARI

ENTERED ON MARCH 11, 1988

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS

TEDDY ROUSSELLE No. 87-K-2419

- - - -

IN RE: Rousselle, Teddy, Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number KA-3791: Parish of Plaquemines 25th Judicial District Court Div. B, Number 80630

- - - -

March 11, 1988

Denied. The result is correct.

JCW JAD WFM
JLD LFC

CALOGERO, J., concurs with reasons.

LEMMON, J., would grant the writ.

Supreme Court of Louisiana
March 11, 1988

/S/ illegible

Clerk of Court
For the Court

APPENDIX C

STATE OF LOUISIANA V TEDDY ROUSSELLE,
520 sd 739(1987)

DECISION OF FOURTH CIRCUIT
COURT OF APPEAL

ENTERED ON OCTOBER 7, 1987

STATE OF LOUISIANA	*	No. KA-3791
versus	*	Court of Appeal
TEDDY ROUSSELLE	*	Fourth Circuit
	*	State of Louisiana

* * * * * * * * * * * *

APPEAL FROM THE TWENTY-FIFTH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES, NO. 80630,
Division "B"
HONORABLE EMILE E. MARTIN, III JUDGE

* * * * * * * * * * * *

JIM GARRISON
JUDGE

* * * * * * * * * * * *

(Court composed of Judges Jim Garrison, Denis A. Barry and Charles R. Ward)

BARRY, J., DISSENTS WITH WRITTEN REASONS

HON. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL
New Orleans, Louisiana 70112
HON. DARRYL W. BUBRIG, SR.,. DISTRICT ATTORNEY
Pointe-A-La-Hache, Louisiana 70082
GILBERT V. ANDRY, III, ASST. DISTRICT ATTORNEY
New Orleans, Louisiana 70130
Attorneys for Plaintiff-Appellee

ROBERT E. LEE
New Orleans, Louisiana 70114
Attorney for Defendant-Appellant

Oct 7 1987
AFFIRMED

The defendant, Teddy Rousselle, was charged by bill of information with cruelty to a juvenile, a violation of LSA-R.S. 14:93. After waiving his right to a trial by jury, the defendant was found guilty as charged by the trial judge. The defendant was later sentenced as a multiple offender to fifteen years at hard labor. He now appeals his conviction and sentence.

On September 11, 1984, Loretta Mathews and the defendant, Mathews' boyfriend with whom she lived, brought Mathews' thirteen month old daughter, Elizabeth, to the Charity Hospital Emergency Room in New Orleans for bruises and a hematoma on her head and for seizures. Dr. Nahed Assaad examined the child and found a hematoma on her head, bruises on her face, back and buttocks and lesions inside of her mouth. Because Dr. Assaad suspected child abuse, he ordered x-rays to be taken of the child. These x-rays indicated that the child also had healing fractures in both wrists. Tests conducted on the child's brain indicated an affection; therefore, Dr. Assaad consulted a pediatric neurologist who diagnosed that the child had suffered focal seizures. Medication was then given to the child to prevent more seizures and the child was kept at the hospital for observation for eight days.

At the hospital, Loretta Mathews told the doctor that the child's injuries had been caused because the child was highly active and often got hurt while running too quickly. Later, Mathews recanted her version of the injuries given at the hospital and told a police detective that the defendant was responsible for the child's injuries. Mathews claimed that she lied initially out of fear of the defendant who had allegedly beaten her in the past.

At trial, Mathews testified that the defendant would often slap the child when she cried in her playpen. In another instance, while riding in a car, the defendant

repeatedly slapped the child in the face because of her refusal to be quiet. Mathews also testified that one day when the defendant was sick and at home, the child started crying and when Mathews walked into the room, the defendant was holding the child down on the bed and punching her in the face. The defendant later attempted to apply ice to the child's bruises caused by the punching but when she refused to remain still, he became angered, put the child face down on a towel filled with ice and tied the child;'s feet and arms behind her back. After this incident, the child refused to eat or drink. The couple finally took the child to the hospital when Mathews noticed that the child had a soft spot on her head and that the child's eyes were rolling in her head.

In the first assignment of error, defendant argues that the trial court erred in overruling his objection to allegedly leading questions asked by the State to its witness, Loretta Mathews. Because the defendant did not brief this assignment of error, it is deemed abandoned on appeal. Uniform Rules, Courts of Appeal Rule 2-12.4.

In the second assignment of error, the defense argues that the trial court erred in not allowing State witness Loretta Mathews to answer, on cross-examination, the theoretical question of whether a car seat used to transport her child could have caused some of the child's injuries. Because this witness was not qualified as an expert, the trial court properly sustained the State's objection to this question because a non-expert witness can only testify as to facts within her knowledge and cannot give an opinion. LSA-R.S. 15:463.

Thirdly, the defendant argues that the trial judge erred in sustaining the State's objection to certain testimony given by the defendant's mother, Joan McDonald. The State's objection was based on the argument that the

testimony was hearsay and improper impeachment of a State witness.

The questionable testimony concerned the night that the child was brought to the hospital. Earlier that evening, Mathews and the defendant were at McDonald's house and they showed McDonald the soft spot on the child's head. When McDonald asked Mathews what had happened to the child, Mathews responded as follows, according to McDonald's testimony:

> "Well today, when I was washing the baby, she was irritable and cross and she didn't want to take her bath." And she said, "So I picked her up and said, "Little girl, you are going to take your bath or else."

At that point, the State objected and this objection was sustained.

We concluded that the trial judge erred in sustaining the State's objection to McDonald's testimony made on the basis of hearsay and improper impeachment of a State witness. Because McDonald's statements were being offered to show the contents of her conversation with Mathews and not to show the truth of what had been said, the hearsay objection was without merit. *State v. Shoemaker,* 500 So.2d 385 (La. 1987).

The State's objection, made on the basis of improper impeachment, was also without merit in that there was no indication that this testimony was being offered by the defense for the purpose of impeaching the credibility of Loretta Mathews. The defense was merely attempting to present their version of the facts and should have been allowed to do so.

In not allowing McDonald to complete her version of the facts in this case, it can be surmised that the defendant may have been prevented from presenting a defense, i.e. McDonald's possible implication of Mathews in this crime. However, because the defendant did not make any showing of prejudice and did not specifically allege that he was denied the opportunity of presenting a defense, the refusal of the trial judge to allow McDonald to complete her testimony was harmless error.

In the fourth and sixth assignments of error, the defendant claims that the evidence presented at trial was insufficient to convict the defendant. Specifically, he argues that the State failed to establish that the defendant was over seventeen years of age at the time of the crime, an essential element of the crime of cruelty of a juvenile.

For a conviction of the crime of cruelty to a juvenile, the following elements must be established:

> 1) that the defendant was over the age of seventeen;
>
> 2) that the victim was under the age of seventeen;
>
> 3) that the victim was caused unjustifiable pain or suffering; and that the defendant intentionally mistreated or neglected the victim, or
>
> 4) that the defendant was criminally negligent in her mistreatment or neglect of the child. LSA-R.S. 14:93.

Although the State did not offer any direct evidence as to defendant's age, testimony by Loretta Mathews and Joan McDonald, defendant's girlfriend and mother respectfully, established that defendant was employed by the Belle Chasse Fire Department and had been on "ambulance duty" on the day before the evening that Elizabeth Mathews was taken to the hospital. Although this evidence is

circumstantial, it allows for the reasonable inference that the defendant had to be over the age of seventeen to qualify to hold such a job.

The evidence clearly establishes the other elements of this crime. The victim's mother testified that the victim was thirteen months old at the time of the offense. The fact that the victim was caused unjustifiable pain and suffering was clearly evidenced by the many bruises and fractures on the child and the seizures suffered by the child. Testimony also showed that the defendant intentionally mistreated the child by slapping her, punching her and by placing her face down on a towel containing ice with her hands and feet tied. Therefore, viewing the evidence in the light most favorable to the prosecution, the fact finder could have concluded that the defendant was guilty beyond a reasonable doubt of cruelty to a juvenile. *Jackson v. Virginia*, 443, U.S. 307, 99 S. Ct. 2781 (1979).

In his final assignment of error, the defendant argues that he was erroneously adjudged as a habitual offender because the predicate offense used to enhance his sentence for the instant offense was committed more than five years before the instant offense. In the statute which provides for the enhancement of sentences of habitual offenders, LSA—R.S. 15:529.1, Section C provides as follows:

> "C. This Section shall not be applicable in cases where more than five years have elapsed since the expiration of the maximum sentence, or sentences, of the previous conviction, or convictions, and the time of the commission of the last felony for which he has been convicted. In computing the period of time as provided herein, any period of servitude by a person in a penal institution, within or without the state, shall not be included in the computation of any of said five year periods."

The Louisiana Supreme Court has interpreted the five year cleansing period to mean that a sentence may not be enhanced if five years have elapsed between the date of defendant's discharge from supervision for the predicate offense and the date of the commission of the offense resulting in defendant's instant conviction. *State v. Vincent*, 387 So.2d 1097 (La.1980).

In this case, defendant's prior conviction occurred in 1979. He was sentenced to six years at hard labor but his sentence was suspended and he was placed on six years active probation. Therefore, because the defendant was not even discharged from supervision at the time of the instant offense in 1984, the five year cleansing period of 15:529.1(C) had not yet begun to run. Thus, the trial judge properly used the defendant's 1979 conviction as a predicate in enhancing defendant's sentence for the instant conviction.

In the second part of this assignment, the defendant argues that his sentence of six years probation for his 1979 conviction violates LSA—C.Cr.P. art. 893(A) which limits a probation period to five years. If the defendant wishes to attack the legality of his sentence for this earlier conviction, he should seek post-conviction relief in the trial court which issued this sentence.

For the reasons stated above, the defendant's conviction and sentence are affirmed.

AFFIRMED.

BARRY, J. Dissents

I disagree with the majority's conclusion on the exclusion of certian testimony by the defendant's mother, Joan McDonald. The majority states that the "defense was merely attempting to present their version of the facts and should have been allowed to do so." However, the majority concludes that this was harmless error because the defendant "did not make a showing of prejudice and did not specifically allege that he was denied the opportunity of presenting a defense."

In determining whether an error is harmless the relevant query is whether there is a reasonable possibility that the evidence might have contributed to the conviction. *State v. Seward*, 509 So.2d 413 (La. 1987).

It is obvious that the defendant was denied the opportunity to present a defense, i.e., that someone else was responsible for the child's injuries. No other testimony indicates that the mother threatened the child. If the evidence had been admitted the trier of fact could have determined its credibility.

Under these circumstances, I cannot conclude that there was no reasonable possibility that the evidence (had it been presented) might have contributed to the conviction. See also *State v. Shoemaker*, 500 So.2d 385 (La. 1987); *State v. Jackson*, 419 So.2d 425 (La. 1982) on rehearing.

The conviction should be reversed and the case remanded for a new trial.

APPENDIX D

EXCERPT OF TRIAL TRANSCRIPT
REFERRED TO IN COURT OF APPEAL DECISION
STATE'S EVIDENCE OF DEFENDANT'S AGE

25th JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

STATE OF LOUISIANA NO. 80630

vs

TEDDY ROUSSELLE DIVISION "B"
(Cruelty to Juveniles)

Testimony and notes of evidence taken in open court, under oath, in the above-entitled and numbered matter, before HONORABLE EMILE E. MARTIN, III, Judge, Division "B", presiding, on Wednesday, March 6, 1985.

APPEARANCES:
MR. FRANK KLEIN, ESQ.
Assistant District Attorney
MR. ROBERT E. LEE, ESQ.
Attorney for Defendant

ALSO PRESENT:
Teddy J. Roussell,
Defendant

REPORTED BY:
Peter P. Borrello, Jr.,
Official Court Reporter

MR. KLEIN:
I call, "State of Louisiana versus Teddy J. Roussell."

THE COURT:

"State of Louisiana versus Teddy J. Roussell, 80630."

Let the record reflect Mr. Roussell is present in court accompanied by his attorney, Mr. Robert E. Lee and that Mr. Frank Klein is the Assistant District Attorney in this matter.

MR. LEE:

Good morning, your Honor.

THE COURT:

Good morning.

MR. KLEIN:

The State is ready for trial, your Honor.

MR. LEE:

The defense is ready for trial, your Honor.

THE COURT:

Proceed, Mr. Klein.

MR. KLEIN:

If your Honor please, at this time the State, in accordance

WITNESS INDEX

DR. HAHED ASSAAD

Direct examination by Mr. Klein.....4
Cross examination by Mr. Lee.....10
Redirect examination by Mr. Klein.....11
Direct examination by Mr. Klein.....12
Cross examination by Mr. Lee.....22
Redirect examination by Mr. Klein.....31

JAMES R. HONEA
Direct examination by Mr. Klein.....34
Cross examination by Mr. Lee.....37

MICHAEL NUDGE
Direct examination by Mr. Klein.....39
Cross examination by Mr. Lee.....42

LORETTA MATHEWS
Direct examination by Mr. Klein.....44
Cross examination by Mr. Lee.....61

JOAN McDONALD
Direct examination by Mr. Lee.....75

* * *

what happened.

MR. KLEIN:
I don't think you ought to get abusive.

THE COURT:
Just ask questions.

CROSS EXAMINATION BY MR. LEE:

Q What happened, Loretta?

A I don't know how she got the hematoma on her head. I just know that Teddy hit her in the face.

Q When?

A When we went to the movies.

Q When?

A On our birthdays.

Q What is the date of her birthday?

A Pardon?

Q What is the date of her birthday?

A Mine and Teddy's birthday is the day we went to the movies.

Q What was the date?

A August 21.

Q How long did you live with Teddy?

A Four months.

Q Do you know who he was employed by?

A Yes.

Q Who?

A Belle Chasse Fire Department.

Q Was he ever employed by any ambulance service?

A Yes.

Q And in the course of his duties, was he ever required to spend long periods of time away from the house?

A No. When he had ambulance, he stayed home.

Q Was he home 24-hours a day?

A When he had ambulance.

Q He was home 24-hours a day?

A No. Just 12.

Q Was he ever gone from home a week at a time.

A No.

Q But, he was gone extended periods of time, 12 hours.

A Yes.

Q And you were left with the child?

A Yes.

Q Did you care for the child?
Did you bathe the child from time to time?

A Yes.

Q And who changed the child and put diapers on her?

A I did.

Q You testified about Teddy wanting to put some ice on the child's face and he took it out and laid it on the bed and laid the child face down, is that

(After first being duly sworn,
the witness did testify as follows:)

DIRECT EXAMINATION BY MR. LEE:

Q Ms. McDonald, do you know the defendant on my left here (indicating)?

A Yes. He is my son.

Q That is your son?

A Yes, sir.

Q Do you know the lady that he was living with at the time that this baby was allegedly to have been struck?

A Yes, I do.

Q Did she, Loretta and your son approach you one day in connection with a soft spot or what appeared to be a wound i the baby's skull?

MR. KLEIN:

Objection. Leading.

THE COURT:

The court is going to overrule the objection.

DIRECT EXAMINATION BY MR. LEE:

Q You can respond.

A Yes, sir.

Q Now, tell the Court, please, the conversation from you to the defendant, Teddy, your son and Loretta, in connection with that baby?

A It was s Sunday night. My son had ambulance duty that day. He was at the picnic. They were on stand-by. He had told me that morning when I called him to wake him up for ambulance duty, that after he was on duty, they would go bowling. Well, that night, they came by my house and he said: "Mama, I want you to look at Elizabeth's head, the baby." And It had a little soft spot on the left side. And I asked and I said, "What happened?" And Loretta said, "Well, today when I was washing the baby, she was irritable and cross and she didn't want to take her bath." And she said, "So, I picked her up and I said, "Little girl, you are going to take your bath or else."

MR. KLEIN:

Your Honor, I will object again to all of this as pure hearsay. Now, this is impeaching testimony of the State's witness. And in order to impeach a State witness, certain procedures have to be followed. You can't introduce impeaching testimony until you have asked the witness, "Did you make such and

APPENDIX E

ENTIRE CASE, STATE OF LOUISIANA V BERKLEY, 482 Snd 140 (1986)

STATE of Louisiana

v.

Debra BERKLEY.

Fourth Circuit.

Jan. 15, 1986.

Defendant was convicted in the Criminal District Court, Parish of Orleans, Frank A. Marullo, J., of cruelty to juveniles, and defendant appealed. The Court of Appeal, Byrnes, J., held that failure to present evidence showing that defendant was over age of 17 was error patent.

Reversed.

Criminal Law 1129(1)
Infants 20

Failure to present evidence establishing that defendant was over age of 17 was error patent in trial for cruelty to juveniles.
LSA—R.S. 14:93.

Craig Cowart, Orleans Indigent Defendant Program, New Orleans, for appellant.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Harry F. Connick, Dist. Atty., Judith Brewster, Asst. Dist. Atty., New Orleans, for appellee.

Before WARD and BYRNES, JJ., and PRESTON H. HUFFT, J. Pro Tem.

BYRNES, Judge.

Defendant was convinced of cruelty to juveniles, a violation of R.S. 14:93 and sentenced to eighteen months in Parish Prison. This sentence was suspended and defendant was placed on three years active probation with special conditions. Defendant has appealed her conviction, assigning as error the sufficiency of the evidence against her.

STATEMENT OF FACTS

On March 2, 1981, at approximately 10:00 a.m. the defendant's sister, Ms. Trivia Wicks, left her four-month old son, Larry Donwell, in the defendant's care at 6 Mars Place (or Court) where the defendant and her sister resided. Later that day, Ms. Linda Billups, a Human Service worker, investigated a claim of neglect at this address. She found six children present, the oldest was seven years old and the youngest (the alleged victim in this case) was four months old. The house was dirty and in disorder. The milk in the baby's (the alleged victim's) bottle was nearly sour and there was no other food in the house suitable for the baby.

Detective Joan Charles of the NOPD Child Abuse Division also investigated this residence. She found the alleged victim lying on a urine soaked mattress with a bottle containing nearly sour milk. The cloth the baby was wearing was wet. She also discovered human feces on a kitchen chair and in the bathroom.

ERRORS PATENT

We have reviewed the record for errors patent and find errors.

SUFFICIENCY OF EVIDENCE

At the time of the offense, R.S. 14:93 provided:

> Cruelty to juveniles is the intentional or criminally negligent mistreatment or neglect, by anyone over the age of seventeen, of any child under the age of seventeen whereby unjustifiable pain or suffering is caused to said child. Lack of knowledge of the child's age shall not be a defense.
>
> Whoever commits the crime of cruelty to juveniles shall be fined not more than one thousand dollars, or imprisoned for not more than two years, with or without hard labor, or both.

Due process is not satisfied, and a conviction cannot stand unless the State proves the essential elements of the crime beyond a reasonable doubt. *State v. Trosclair,* 443 So.2d 1098 (La. 1983). Applying this principle to the present case, the state was required to prove:

> 1. That the defendant was over the age of seventeen;
> 2. That the victim was under the age of seventeen;
> 3. That the victim was caused unjustifiable pain or suffering; and
> 4. That the defendant intentionally mistreated or neglected the victim, or
> 5. That the defendant was criminally negligent in her mistreatment or neglect of the child.

State v. Green, 449 So.2d 141 (La.App. 4th Cir. 1984).

The record reveals that no evidence was presented at trial establishing that the defendant was over the age of seventeen. Because the State failed to prove this essential element of the crime, we must reverse defendant's conviction.

REVERSED.

APPENDIX F

APPLICATION FOR REHEARING TO THE SUPREME COURT OF LOUISIANA

No. 87-K-2419

DENIAL OF RECONSIDERATION (REHEARING(

ENTERED ON APRIL 11, 1988

In the Supreme Court of Louisiana

****

STATE OF LOUISIANA

VS

TEDDY ROUSSELLE

Relator

APPLICATION FOR RE-HEARING

87-K-2419

Robert E. Lee
Attorney for Relator
3942 Peach Tree Crt.
New Orleans, La. 70131
391-0472

SUBJECT INDEX

LIST OF AUTHORITIES.....ii
ERROR COMPLAINED OF (2).....1
ARGUMENT.....1
CONCLUSION.....2
CITATIONS OF AUTHORITY.....ii
CERTIFICATE.....2

CITATIONS OF AUTHORITY

State v. Berlkey,
482 S2 140

State v. Trosclair,
443 S2 1098, (cited in *Berkley*)

U.S. CONSTITUTION

ERROR COMPLAINED OF:

I The Fourth Circuit Court of Appeals committed error by not following the express law set out in *State v Berkley,* 482 Snd 140 (Fourth Cir.) which held that failure to present *evidence* (emphasis by undersigned) that defendant was over the age of 17 was error *patent* in a trial for cruelty to juveniles. The Court went on to state that "The record reveals that no evidence was presented at trial establishing that the defendant was over the age of seventeen. Because the State failed to prove this *essential* (emphasis-undersigned) element of the crime, we must reverse the defendant's conviction."

II The Fourth Circuit Court of Appeals committed error by denying defendant's mother, Joan McDonald, the right to testify; this Court affirmed the Fourth Circuit and defendant herein adopts Judge Dennis Barry's dissenting opinion therein for the reasons expressed therein.

ARGUMENT:

The Supreme Court did not address this crucial issue of defendant's age and the failure of the State to present evidence as to defendant's age, ie., was he over the age of 17? *State v. Hampton,* supra states that "the State failed to prove this essential element of the crime .....". Criminal statutes must be read stricti juris.

CONCLUSION

For this Supreme Court of Louisiana to not address the serious, crucial issue of the defendant's age with the State's failure, or negligence in not presenting evidence thereto is a violation of defendant's rights under the U.S. Constitution, the 5th amendment and the Equal Protection Clause of the U.S. Constitution.

CERTIFICATE

I hereby certify that I have mailed a copy of this Application for Re-Hearing to all counsel of record and the District Attorney for the Parish of Plaquemines, on the 21st day of March, 1988.

/s/ Robert E. Lee

Robert E. Lee
Attorney for defendant
3942 Peach Tree Crt.
New Orleans, La., 70131
391-0472